

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSIONS

A. Justification

1. *Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.*

The Department is proposing a regulation under Employee Retirement Income Security Act (ERISA) section 3(21)(A)(ii) and Internal Revenue Code (Code) section 4975(e)(3) (B) (proposed regulation). The proposed regulation would amend a rule dating back to 1975 that defines when a person is a “fiduciary” under ERISA and the Code by reason of providing investment advice for a fee or other compensation regarding assets of a plan or IRA (i.e., an investment advice fiduciary). If adopted, the Proposed Regulation would treat investment advisers as fiduciaries in a wider array of advice relationships than the existing regulation.

The Department recognizes that in some instances, plan fiduciaries, participants, beneficiaries, and IRA owners may receive recommendations that should not be treated as fiduciary investment advice. Accordingly, the proposed regulation provides carve-outs to the general investment advice fiduciary definition. These carve-outs focus on communications that the Department believes Congress did not intend to cover as fiduciary “investment advice” and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality. None of the carve-outs apply where the adviser represents or acknowledges its action as fiduciary under ERISA with respect to the advice. Each carve-out is discussed below.

Seller’s Carve-Out

Paragraph (b)(1)(i) of the proposed regulation provides a carve-out to the general investment advice fiduciary definition for advice provided in connection with an arm’s length sale, purchase, loan, or bilateral contract between a sophisticated plan investor that has 100 or more plan participants and the adviser (“seller’s carve-out”). It also applies in connection with an offer to enter into such a transaction or when the person providing the advice is acting as representative, such as an agent for the plan's counterparty. The person must provide advice to a plan fiduciary who is independent of the counterparty and must exercise authority or control respecting the management or disposition of the plan’s assets, with respect to an arm’s length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract.

The seller's carve-out applies if certain conditions are met. Among these conditions are the following: the adviser must obtain a written representation from the plan fiduciary that (1) the plan fiduciary is a fiduciary who exercises authority or control respecting the management or disposition of the employee benefit plan's assets (as described in ERISA section 3(21)(A)(i), (2) the employee benefit plan has 100 or more participants covered under the plan, and (3) the fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity. This is an information collection request (ICR) subject to the Paperwork Reduction Act (PRA).

Platform Provider Carve-Out

Another carve-out is directed to service providers, such as recordkeepers and third party administrators that offer a "platform" or selection of investment vehicles to participant-directed individual account plans under ERISA. Specifically, paragraph (b)(3) of the proposed regulation makes clear that persons who merely market and make available securities or other property through a platform or similar mechanism to an employee benefit plan without regard to the individualized needs of the plan and its participants, or beneficiaries do not act as investment advice fiduciaries. In order for the platform provider carve-out to apply, the person providing the platform must provide a written disclosure to the plan fiduciary stating that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. This disclosure is an ICR subject to the PRA.

Investment Education Carve-Out

Paragraph (b)(6) of the proposal makes clear that furnishing and providing certain specified investment educational information and materials (including certain investment allocation models and interactive plan materials) to a plan, plan fiduciary, participant, beneficiary or IRA owner will not constitute the rendering of investment advice if certain conditions are met. One of the conditions is that the asset allocation models or interactive materials must explain all material facts and assumptions on which the models and materials are based and include a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA to the extent they are not taken into account in the model or estimate. This is an ICR subject to the PRA.

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2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

As discussed above, the Department has designed carve-outs that exclude from the investment advice fiduciary definition communications that the Department believes Congress did not intend to cover as fiduciary investment advice. However, the carve-outs are subject to conditions that ensure that participants and beneficiaries and plan officials clearly understand that the adviser is not acting in a fiduciary capacity. Service providers will use this information to disclose their status to their clients, and their clients will use the information to inform themselves about the status of their adviser. Without these conditions, participants and beneficiaries, plans and IRA investors may be misled into thinking their advisers are acting in their best interests when they are not.

3. *Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.*

Under 29 C.F.R. § 2520.104b-1(b) of ERISA, “where certain material, including reports, statements, and documents, is required under Part I of the Act and this part to be furnished either by direct operation of law or an individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries.” Section 2520.104b-1(c) establishes the manner in which disclosures under Title I of ERISA made through electronic media will be deemed to satisfy the requirement of § 2520.104b-1(b). Section 2520-107-1 establishes standards concerning the use of electronic media for maintenance and retention of records. Under these rules, all pension and welfare plans covered under Title I of ERISA may use electronic media to satisfy disclosure and recordkeeping obligations, subject to specific safeguards.

4. *Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.*

The disclosures required by these carve-outs are unique to this regulation, and therefore, are not duplicative.

5. *If the collection of information impacts small businesses or other small entities describe any methods used to minimize burden.*

These information collections impose a minimal burden on service providers that is necessary to protect the interest of participants and beneficiaries and plan officials.

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6. *Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.*

If this collection were not conducted, participants and beneficiaries could be misled into believing that their advisers are serving them in a fiduciary capacity.

7. *Explain any special circumstances that would cause an information collection to be conducted in a manner:*

- *requiring respondents to report information to the agency more often than quarterly;*
- *requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;*
- *requiring respondents to submit more than an original and two copies of any document;*
- *requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;*
- *in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;*
- *requiring the use of a statistical data classification that has not been reviewed and approved by OMB;*
- *that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or*
- *requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.*

Not applicable.

8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.*

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years -- even if the collection of information activity is

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the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

In accordance with 5 CFR 1320.11, the proposed rule provides the public with 60 days to comment on the information collections and burden estimates.

9. *Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.*

No payments or gifts are provided to respondents.

10. *Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.*

No assurance of confidentiality was provided.

11. *Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.*

There are no questions of the nature described.

12. *Provide estimates of the hour burden of the collection of information. The statement should:*

- *Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.*
- *If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens.*
- *Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here.*

As in Item 1 above, the proposed rule includes three information collections: the seller's carve-out, the platform provider carve-out, and the investment education carve-out. The hour burden associated with each of these ICRs is discussed below.

Seller's Carve-Out

The Department estimates that 50 percent of the 85,863 retirement plans with 100 or more participants that filed a Form 5500 in 2012 will use the seller's carve-out.

The Department estimates that each plan will require one hour of legal professional time to produce the required disclosures. Therefore, the disclosures will result in approximately 43,000 hours of legal time.¹ At an hourly wage rate² of \$129.94 for in-house legal staff,³ this results in an equivalent cost of approximately \$5.6 million.⁴

The Department also estimates that each plan will require 30 minutes of clerical time to produce the required disclosures. Therefore, the disclosures will result in approximately 21,000 hours of clerical time.⁵ At an hourly wage rate of \$30.42 for clerical staff,⁶ this results in an equivalent cost of approximately \$653,000.⁷

In total, the burden associated with the counterparty limitation is approximately 64,000 hours at an equivalent cost of \$6.2 million.

Platform Provider Carve-Out

The Department estimates that 1,800 service providers⁸ will use the platform provider limitation.

1 85,863 plans x 50 percent x 1 hour = 43,000 hours.

2 The Department's estimated 2015 hourly labor rates include wages, other benefits, and overhead are calculated as follows: mean wage from the 2013 National Occupational Employment Survey (April 2014, Bureau of Labor Statistics <http://www.bls.gov/news.release/pdf/ocwage.pdf>); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2014, Bureau of Labor Statistics <http://www.bls.gov/news.release/ecec.t02.htm>); overhead as a multiple of compensation is assumed to be 25 percent of total compensation for paraprofessionals, 20 percent of compensation for clerical, and 35 percent of compensation for professional; annual inflation assumed to be 2.3 percent annual growth of total labor cost since 2013 (Employment Costs Index data for private industry, September 2014 <http://www.bls.gov/news.release/eci.nr0.htm>).

3 Legal Professional (23-1011): $\$63.46(2013 \text{ BLS Wage rate}) / 0.69(\text{ECEC ratio}) * 1.35(\text{Overhead Load Factor}) * 1.023(\text{Inflation rate}) ^2(\text{Inflated 2 years from base year}) = \129.94

4 43,000 hours x \$129.94 per hour = \$5.6 million.

5 85,863 plans x 50 percent x 30 minutes = 21,000 hours.

6 Secretaries, Except Legal, Medical, and Executive (43-6014): $\$16.35(2013 \text{ BLS Wage rate}) / 0.675(\text{ECEC ratio}) * 1.2(\text{Overhead Load Factor}) * 1.023(\text{Inflation rate}) ^2(\text{Inflated 2 years from base year}) = \30.42

7 21,000 hours x \$30.42 per hour = \$653,000.

8 The Department assumes that recordkeepers will be the primary users of the limitation and that nearly all recordkeepers will do so. In 2012, 1,780 recordkeepers were reported on the Form 5500 Schedule C. The Department rounded up to 1,800 to reflect other possible types of service providers that could use the limitation in small numbers.

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The Department estimates that each service provider will require ten minutes of legal professional time to adjust existing service provider contracts to include the required disclosure. Therefore, the disclosure will result in approximately 300 hours of legal time.⁹ At an hourly wage rate of \$129.94 for in-house legal staff, this results in an equivalent cost of \$39,000.¹⁰

Investment Education Limitation

The Department estimates that 2,800 financial institutions¹¹ will use the investment education limitation. The Department estimates that each financial institution will require 20 minutes of legal professional time to adjust existing investment materials to include the required disclosure. Therefore, the disclosure will result in approximately 900 hours of legal time.¹² At an hourly wage rate of \$129.94 for in-house legal staff, this results in an equivalent cost of \$121,000.¹³

Summary

In total, as seen in the table below, the Department estimates that the disclosures required by the three limitations will require 65,200 hours of burden annually at an equivalent cost of \$6.4 million.

Activity	Total Annual Burden (Hours)	Hourly Rate	Monetized Value of Respondent Time
Seller's Carve-Out Clerical	21,000	\$30.42	\$653,000
Seller's Carve-Out Legal	43,000	\$129.94	\$5.6 million
Platform Provider Carve-Out Legal	300	\$129.94	\$39,000
Investment Education Carve-Out Legal	900	\$129.94	\$121,000
<i>Unduplicated Totals</i>	<i>65,200</i>		<i>\$6.4 million</i>

⁹ 1,800 service providers x 10 minutes = 300 hours.

¹⁰ 300 hours x \$129.94 per hour = \$39,000

¹¹ The Department assumes that broker-dealers will be the primary users of the limitation. Internal estimates suggest that of the 4,410 broker-dealers registered with the SEC, 2,619 service ERISA plans or IRAs. The Department rounded up to 2,800 to reflect other possible types of financial institutions that could use the limitation in small numbers.

¹² 2,800 financial institutions x 20 minutes = 900 hours.

¹³ 900 hours x \$129.94 per hour = \$121,000.

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13. *Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 or 14).*

The Department estimates that all disclosures will be transmitted electronically through regular means of communication, or else occupy very small amounts of space on existing paper documents. Therefore, the costs associated with these requirements are de minimis. No other cost burdens are associated with these information collections.

14. *Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.*

No cost to the Federal Government.

15. *Explain the reasons for any program changes or adjustments reported in Items 13 or 14.*

Not applicable.

16. *For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.*

There are no plans to publish results of this information collection.

17. *If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.*

The collection of information will display a currently valid OMB control number.

18. *Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submission."*

None.

B. Statistical Methods

This information collection does not employ statistical methods.